

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: August 14, 2020

TO: Council President Pro Tem Barbara Bry

FROM: City Attorney Mara W. Elliott

SUBJECT: Response to August 6, 2020 Hearing Questions Regarding Item 603 – 101 Ash Street Project Status Update

At the hearing on August 6, 2020, concerning the City's purchase of the building at 101 Ash Street, you posed a series of questions to me as the City's Attorney, which I have answered below.

As you know, I took Office the very day that you did, December 12, 2016, and the decision to purchase the building at 101 Ash Street preceded my administration. As a Chief Deputy City Attorney, the position I held before becoming City Attorney, I managed seven deputy city attorneys who advised the Purchasing and Contracting Department (goods, services, and consultants), Environmental Services Department, Office of ADA Compliance and Accessibility, Equal Opportunity Contracting, Storm Water, Information Technology, and the Library. Real estate contracts and transactions were not handled by my unit.

The City Council's first reading of the ordinance approving the lease/purchase agreement occurred on October 17, 2016, and its second reading occurred on November 15, 2016. The date of final passage was November 17, 2016, when the Mayor signed the ordinance. It was signed as to form by the assigned Deputy City Attorney on December 19, 2016, one week after I took office.

While the decision to enter into this lease/purchase agreement preceded my term as City Attorney, I am committed to addressing the issues associated with this agreement in a manner that best protects San Diego taxpayers.

In order to respond to your questions, my staff and I have reviewed our own files as well as public information provided by City-hired consultants and City staff.

As discussed in the Preliminary Forensic Report publicly issued by the Hugo Parker law firm (the "Report"), the 101 Ash Street transaction involved terms nearly identical to the lease/purchase agreement the City entered into in 2015 for the Civic Center Plaza (CCP). As

explained in the Report, the biggest difference in the transactions is that the City had occupied the CCP and knew what it was purchasing, whereas the City had not occupied 101 Ash Street before the lease/purchase occurred and did not perform its own due diligence, instead relying on the seller's representations.

Questions

In response to your first three questions: *Did you review and approve the lease/purchase agreement presented to the City Council? Did you advise the city council on the unusual indemnity language in the lease/purchase agreement that relieves the sellers of all future liability? Did you advise the city council on the consequences of accepting the blanket indemnity language?*

As explained above, that transaction preceded my tenure as San Diego City Attorney and I did not work on the matter as a Chief Deputy City Attorney.

In response to your fourth, fifth, and sixth questions: *Who filled out the Section 225 form that requires disclosure of all individuals and entities who have a financial interest in the transaction? On what date was the 225 filled out, and was it ever provided to the public or the city council? What names are listed on the 225 form?*

The Real Estate Assets Department (READ) completes the Charter section 225 forms. We contacted READ on your behalf and the department responded to your questions as follows:

“At the time of the transaction there was no form filled out, as Charter Section 225 was interpreted such that the information only needed to be provided to READ and there was no specific or required process or form. In this instance, the information was provided verbally to the department director, who documented the information and placed it in the file. In 2018 Charter 225 was updated to the current version.”

“There was no date on the note to file, it references 10-17-16, however it is not noted one way or another as to the date of creation. At the time of the transaction, the information was not required by the Charter to be provided in a public meeting or to the City Council and as such, was not provided to the public or the City Council. In December of 2018 Charter 225 was updated to the current version with specific requirements which include the following:

Section 225: Mandatory Disclosure of Business Interests

Every person or entity contracting with the City shall first disclose to the City the names and identities of all natural persons who will receive more than 10% of the contracted amount or who own more than 10% of the entity contracting with the City, where the City will be expending or receiving more than the amounts established by ordinance of the City Council or where the City Council approval is required by this Charter or by ordinance. Contracts subject to this Section include,

but are not limited to, contracts awarded pursuant to Section 94 of this Charter, transfers of interests in the City's real or personal property, and grants or renewals of franchises pursuant to Sections 103 or 103.1 of this Charter. The same disclosure shall be made to the City by every person or entity later receiving or assuming any rights or obligations under such contracts where City approval is required to transfer such rights or obligations.

The City may reject a proposed contract, terminate a current contract, or rescind a prior contract, if any person or entity submits false information or omits information required to be disclosed by this Section.

The City shall provide the City Council with the disclosures received from every person or entity contracting with the City where City Council approval is required, prior to the City Council meeting where the contract will be considered. If the person or entity the City will be contracting with has not been determined by the date of the City Council meeting, the City shall provide the City Council with the disclosures at least fifteen days prior to awarding the contract.

This Section does not apply to public agencies, or to entities that are publicly traded companies listed on a stock exchange in the United States.

This Section shall not preclude the City from requiring disclosure of any other information from persons or entities contracting with the City.

(Addition voted 06-02-1992; effective 07-13-1992.)

(Amendment voted 11-06-2018; effective 12-24-2018)"

"The names listed on the note to file are: Steven Black and Jason Wood, Cisterra Development."

In response to your last question: *Do you now accept the conclusion of the independent forensic report that the terms of the lease agreement were, in fact, "disproportionately unfavorable to the city, on the specific issue of the exculpatory provisions in favor of (sellers)."*

The Report makes clear that the lease/purchase terms are very unfavorable to the City. As City Attorney, ensuring the City is protected in real estate transactions is a priority. As you witnessed in my handling of the Purchase and Sale Agreement between the City of San Diego and the California State University system for the sale of the Mission Valley stadium site, my Office kept the Mayor and City Council apprised every step of the way. My Office issued fourteen Memoranda of Law and four Reports explaining the options and legal implications of each. As I have shown throughout my tenure, I am committed to protecting the interests of San Diego's taxpayers, and I did just that during the stadium site negotiations despite tremendous political pressure to sign away the City's right to appropriate indemnification and other protections.

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As you know, my Office is working closely with the Mayor and City Council, including your office, to consider every option at the City's disposal to address this purchase and protect the interests of San Diego taxpayers.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Mara W. Elliott

Mara W. Elliott

City Attorney

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MS-2020-22

Doc. No.: 2452535

cc: Honorable Mayor Kevin Faulconer
Members of the City Council
Chief Operating Officer Kris Michell
Andrea Tevlin, Independent Budget Analyst